

**Editor's note: Appealed -- reversed, Civ.No. 5-89-CV-97 (WD Mich. Aug. 12, 1991), 770 F.Supp. 1205; aff'd sub nom. U.S. v. Barbara Wolff and Janice Tinker, No. 91-2252 (6th Cir. June 15, 1992), 967 F.2d 222, rehearing denied 974 F.2d 702 (1992)**

OLIVE WHEELER

IBLA 87-791

Decided April 27, 1989

Appeal from a decision of the Eastern States Office, Bureau of Land Management, dismissing a protest of determination of public land status. ES 36150.

Affirmed.

1. Public Lands: Generally--Public Lands: Riparian Rights--Surveys of Public Lands: Omitted Lands

An island, whether located in navigable or nonnavigable waters, that is omitted from a survey remains public domain and may be surveyed and disposed of by the United States.

APPEARANCES: David W. McKeague, Esq., Lansing, Michigan, for appellant; David S. Hudson, Esq., and Kristina Clark, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Olive Wheeler has appealed a decision issued August 3, 1987, by the Eastern States Office, Bureau of Land Management (BLM), dismissing her protest of BLM's determination that an island of approximately 0.9 acres in Arbutus Lake, Grand Traverse County, Michigan, is public land. The island is described as Tract 39, sec. 9, T. 26 N., R. 10 W., Michigan Meridian. Appellant resides on the island in the summer; she received it from her husband's estate; his mother had obtained it by warranty deed dated October 8, 1921.

The exterior boundaries of T. 26 N., R. 10 W., as well as the subdivisional lines, were surveyed in 1839. The subdivisional lines were resurveyed in 1852. According to BLM,

[T]he resurvey plat, depicting several meandered lakes including Arbutus Lake, was examined and approved by the Surveyor General on November 4, 1853. Neither the field notes of the survey nor the plat make any reference to islands in Arbutus Lake.

\* \* \* Tract 39 did not appear on either the 1839 or 1853 plats of survey, nor was

it mentioned in the field notes of those surveys. Both the 1833 and 1850 [general] instructions [of the Surveyor General to his deputies for surveys in Michigan] instructed the surveyors not to survey islands unsuitable for cultivation. Presumably that is why Tract 39 was excluded from both of the early surveys. [1]

Lot 2, the riparian tract situated immediately to the west of Tract 39 across a 200-foot wide "channel" of water, was patented to the State of Michigan on March 28, 1871, pursuant to the Acts of June 3, 1856, 11 Stat. 21, and June 7, 1864, 13 Stat. 119. These acts granted the State alternate sections of public lands to aid in the construction of certain railroads. Pursuant to Michigan law, the State granted the lands patented in accordance with these Federal acts to the Grand Rapids and Indiana Railroad Company on the date of the Federal patent. 2/ On July 24, 1891, the railroad conveyed lot 2 (among other lands) to a Jonathan W. Cobbs and William W. Mitchell. After several further conveyances, Thomas Hansberger and his wife "first conveyed the 'entire island' separately from lot 2 on October 8, 1921 to Mrs. F. J. Wheeler, the mother-in-law of Mrs. Olive Wheeler," by warranty deed describing the island as "part of lot 2." 3/

On July 31, 1985, BLM's Division of Cadastral Survey approved special instructions to provide for the examination and conditional survey of the island, "for the purpose of determining ownership or resolving possible trespass on Federally owned land." The scope of the examination, according to the instructions, was to determine whether the island "existed as a well-defined body of land, separate and distinct from the mainland, and above the ordinary high water mark on January 26, 1837, when Michigan entered the Union, and at all subsequent dates."

By letter dated September 4, 1985, BLM informed appellant that a preliminary examination and conditional survey would be made "of an island in Arbutus Lake which may have been omitted from the original survey" to determine whether the island was "public domain land belonging to the Federal government."

BLM's survey was completed on September 10, 1985. The field notes of the survey describe the island as consisting of sandy loam that rises gradually from all sides to a height of 35 feet above the normal lake level. It is surrounded by a channel of water 5 to 15 feet deep; the nearest mainland is west approximately 3 chains (198 feet) across a channel that reaches a depth of 5 feet. The level of the lake at the time of survey agreed with

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1/ BLM Answer at 2-3. Neither the plats nor the field notes from the early surveys are included in the record.

2/ Memorandum of Law dated June 16, 1986, Exh. D to Appellant's Statement of Reasons for Appeal (SOR) at 3.

3/ Id. at 4. The description in the warranty deed, Exhibit B to Appellant's SOR for Appeal, reads: "An entire island in Arbutus Lake consisting of about one acre of land located near the west shore of said lake and about four rods [66 feet] from said shore and being a part of lot two, of section nine, town twenty six north, range ten west."

the original meander corner and the original record meander line. The surveyors found a white pine on the island more than 75 years old and a red oak approximately 78 years old, as well as stumps measuring 2 to 2-1/2 feet in diameter. Local residents said that during dry years they pulled logs and stumps out of the channel to the west to facilitate passage by motorboats; no evidence of stumps in the middle of the channel was found during the field survey, however. The residents also said that the island had been there as long as they could remember and had not been connected to the mainland. The field notes conclude:

In consideration of the islands' [sic] characteristics, similar in all respects to the opposing surveyed land, the size and age of timber grown thereon, and the elevation above the lake level, it was determined that the island was in existence in 1839 when the township was subdivided, in 1837 when the State of Michigan was admitted into the Union and at all subsequent dates and is public land of the United States.

On May 2, 1986, the plat representing the survey of Tract 39 was officially accepted by BLM. BLM published a notice of the filing of the plat on May 22, 1986, in the Federal Register. See 51 FR 18845 (May 22, 1986). It read in part:

4. The present water level of the lake compares favorably with that of the original meander line, therefore, the elevation and upland character of the island along with the depth and width of the channel between the upland and the island are considered evidence that the island did exist in 1837, the year Michigan was admitted into the Union.

[5.] Tract 39 is more than 50% upland in character within the purview of the Act of September 28, 1850 (9 Stat. 519). Therefore, the island is held to be public land.

The notice stated that the island would "not be subject to application, petition, location, or selection under any public [land] law" until June 30, 1986, and that anyone interested in protesting the determination that the island is public land of the United States "must present valid proof showing that the island did not exist at the time of statehood or that it was attached to the mainland at the time of the original survey" before June 30. Inquiries concerning Color of Title Act claims were to be filed with BLM after that date. 4/ Appellant received a copy of BLM's notice by certified mail.

Appellant filed a protest with BLM on June 19, 1986. 5/ It included a letter (dated May 13, 1985) stating her recollection that the water was so low in the spring of 1927 that "you could almost walk to the mainland."

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4/ See 43 U.S.C. § 1068 (1982); 43 CFR Part 2540.

5/ As a result, BLM stayed the official filing of the plat. See 51 FR 23843 (July 1, 1986).

"There were no trees except small ones," she reported, "because the area had been timbered many years earlier and also I was told had been subject to several forest fires." Other neighbors on the lake told her that "after the trees were cut the water came up 5 or 6 feet and flooded boathouses and created islands out of peninsulas [sic]." The channel on the "back side" of the island was shallow, and her husband was concerned "that small boats with motors going thru that channel would drag bottom and hit logs or stumps in [the] water and shear a pin. He would wade out to clear them out. Over the years it[']s been shallow and dangerous for boats." The lake has no outlet, so the water level depends on snow and rainfall, appellant explained:

In dry years we'd have a lot more beach. And the docks would have to be moved close to the shore and [the] island would get bigger and [the] channel smaller and shallower. \* \* \* I cannot recall a year out of my 57 years at the island that the water didn't go completely around it \* \* \* but several years I wondered if it might not dry up enough to walk across.

Appellant's protest also included a letter with her daughter's (Betty M. Bell's) recollections of her time on the island:

I remember vividly the dry years of the 30's and 40's, when there was just several inches of water in the channel that separated the island from the mainland. The low water, plus all the logs and stumps made it almost impossible for anything but a small rowboat to maneuver through the channel. This prompted my father to remove the logs and stumps. This action, combined with the tremendous increase in the water level of the lake during the 50's and 60's, and the large increase of power boats on the lake has kept the channel open, and the island "an island".

Appellant also included a letter dated July 23, 1985, from Harold R. Bruning, a professional forester and registered land surveyor, who had visited the island to see if he could determine whether the island was a part of the mainland at the time Michigan became a State. He found what appeared to be a tree trunk 8 inches in diameter standing solidly upright in water 2-1/2 feet deep in the channel. He found no evidence of farming on the island or the mainland that might have changed the topography. Although the lake level has fluctuated over the years, he stated his view that "its present level seems to be close to the level at the time of the government survey. Other surveyors tell me that a meander corner about 1000 ft. south of the island is approximately the same distance from the water as noted by the government surveyor." He also noted that "[w]hen the meander line of the government survey of that portion of Arbutus Lake which straddles the line between Sections 9 and 10 and extends into Sections 3 and 4 is plotted carefully and compared to recent aerial photographs, it fits extremely well." He suggested that the presence of stumps and logs in the channel could be accounted for if one assumed there had been a low wooded strip between the island and the mainland that had been washed away during periods of high water after the trees had been removed. "The tree trunk we found might possibly be a remnant of such a wooded strip," he

stated. "While I cannot say with certainty that the island was connected to the mainland in 1837, there appears to be some support to the statement of your 'old timer' that there were trees on a strip connecting the two," he concluded.

Appellant's protest also included two photographs taken in the summer of 1985 from the west point of the island across the channel toward the shore of the mainland, a chart of the width and depth of this channel since 1955, a chart of the water levels since 1935, and a legal memorandum dated June 16, 1986.  
6/

Appellant argues in her memorandum and on appeal that, under Federal common law, one looks to the law of the state at the time of a conveyance by the Federal government of shoreland to determine whether an island in a non-navigable waterway opposite the shoreland that is not mentioned in the conveyance passes with it or not. Under Michigan law the shoreland owner's riparian ownership extends to the centerline of a lake, appellant observes. Thus, she argues, the island was conveyed to the railroad with the patent of lot 2 in 1871. Appellant distinguishes cases holding islands in navigable waterways that are not mentioned in conveyances of shorelands do not pass, citing Bourgeois v. United States, 545 F.2d 727 (Ct. Claims 1977), in which the court held that title to an island in Jewell Lake in Michigan passed with the bed of the lake to the owner of the shoreland who was a successor-in-interest to a government patent that was silent as to the island.

BLM's August 3, 1987, decision dismissing appellant's protest states:

A well-defined body of land in a meandered body of nonnavigable water [7/] is not a part of the bed of the body of water. The bed of a body of water is land covered by water. A body of land surrounded by water[, ] but never covered by it, is not part of the bed and could not have been included with a patent to riparian lots as an incident of riparian rights.

(Decision at 2). The decision states that it is "long-standing policy of the Department", set forth in the headnote of Emma S. Peterson, 39 L.D. 566 (1911), that

[t]he United States has authority to survey and dispose of an island lying between the meander line and thread of a stream, navigable or nonnavigable, omitted from survey at the time the public land surveys were extended over the township, where it clearly appears that at the time of the township survey the island was a well-defined body of public land unsurveyed.

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6/ See note 2, *supra*.

7/ "The term meandering is applied to the running of a traverse of the shore of a body of land adjacent to or surrounded by water in order to draft a plat and to determine the acreage" (Decision at 2).

BLM's decision goes on to say that "well-defined" means "having clear and distinguishable limits that remain relatively permanent." A rock pinnacle projecting clearly above ordinary high water mark is an example, BLM says, citing United States v. Mission Rock Co., 189 U.S. 391, 393 (1903), as is "a small island of sufficient size and elevation to support upland vegetation." BLM's decision concludes that the island used by appellant possesses these characteristics and is properly considered surveyable public land, based on a review of the information contained in the field notes and in appellant's protest.

[1] Ever since Emma S. Peterson, *supra*, this Department has consistently held that an unsurveyed island, whether located in navigable or nonnavigable waters, remains public domain, does not pass with the bed under the water to a state upon statehood or convey with a grant of riparian land, and may be surveyed and disposed of by the United States. Manual of Instructions for the Survey of the Public Lands of the United States | 233 (1930); Status of Islands in the Arkansas River and Other Streams in Oklahoma Withdrawn from Settlement and Entry Because Within a Petroleum Reserve, 54 I.D. 222, 224 (1933); Manual of Instructions for the Survey of the Public Lands of the United States | 233 (1947); Northern Pacific Railway Co., 62 I.D. 401, 406 (1955); Manual of Instructions for the Survey of the Public Lands of the United States | 3-122 (1973); R.A. Mikelson, 26 IBLA 1 (1976). This position corresponds to that of the Federal courts for islands in navigable waters, Scott v. Lattig, 227 U.S. 229 (1913), and we are not persuaded by Bourgeois v. United States, *supra*, that there should be a different rule for nonnavigable waters. It is not the case, as the court in Bourgeois assumed, that such an island was not surveyed because neither the patentee nor the United States "cared much about who held title to the island," 545 F.2d at 731, but because the general instructions for conducting surveys in Michigan in 1839 and 1853 established practical limits on how much should be accomplished, probably because it was difficult and expensive to conduct surveys of islands. 8/

An island of less than an acre that rose to a height of 35 feet was presumably regarded as unsuitable for cultivation and omitted from the surveys in

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8/ General Instructions to His Deputies; by the Surveyor General of the United States, for the States of Ohio, Indiana, and the Territory of Michigan, issued in 1833, provides, under the section entitled Of Meander-ing Rivers, 8c., "1. You will accurately meander, by course and distance, all navigable Rivers which may bound or pass through your district; all navigable bayous flowing from or into such rivers; all Lakes or deep Ponds, of sufficient magnitude to justify such expense; and all Islands suitable for cultivation." See C. Albert White, A History of the Rectangular Survey System, 298. General Instructions to his Deputies; by the Surveyor General of the United States, for the States of Ohio, Indiana and Michigan, issued in 1850, provided similar language under the same heading: "You will accurately meander, by course and distance, all navigable Rivers which may bound or pass through your district; all navigable bayous flowing from or into such rivers; all lakes and deep ponds, of the area of forty acres and upwards; and all islands suitable for cultivation." See C. Albert White, *supra* at 368.

accordance with the general instructions. Because people wished to purchase such islands, instructions were later issued providing that they would be surveyed for this purpose if the prospective purchasers would bear the expense of the survey. 9/

The present existence of an island and the other facts in the record support BLM's conclusion that this tract was an island at the time Michigan became a state and at the time of the surveys of sec. 9, T. 26 N., R. 10 W., in 1839 and 1852. While appellant has speculated that the island may have been connected to the mainland, there is no convincing evidence that it was. Considered as a whole, the record shows that Tract 39 was separated by water from the mainland at all relevant times. Therefore, under the longstanding Department precedents cited above, Tract 39 remains in the public domain, notwithstanding appellant's 1921 warranty deed and her summer residence there for over 60 years. 10/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Will A. Irwin  
Administrative Judge

I concur:

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David L. Hughes  
Administrative Judge

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9/ Instructions to the Surveyors General of the United States, Relating to Their Duties and to the Field Operations of Deputy Surveyors, issued in 1864, provides:

"7. SMALL ISLANDS MAY BE SURVEYED AT THE COST OF APPLICANTS.

Many applications are received at this office for the purchase of small unsurveyed islands which were omitted when the adjacent lands were surveyed. These islands are usually of too little value to justify the Government in incurring the expense of survey; but where a party desires the survey made and is willing to pay the cost thereof in advance, upon the conditions set forth in these instructions, it may be done under the provisions of the tenth section of the act of May 30, 1862. \* \* \*

"As a general rule, a body of land separated from the main land by a perpetual natural channel may be regarded as an island for the purposes contemplated in these instructions."

See C. Albert White, supra at 503-04 (emphasis in original).

10/ Appellant may wish to consider filing an application under the Color of Title Act. See note 4, supra.